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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1930.

No. 445

FLOY P. BALDWIN, PETITIONER,

vs.

IOWA STATE TRAVELING MEN'S ASSOCIATION.

BRIEF AND ARGUMENT OF RESPONDENT.

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IOWA STATE TRAVELING MEN'S ASSOCIATION.

BRIEF AND ARGUMENT OF RESPONDENT.

The plaintiff in this case commenced a suit against the defendant, the Iowa State Traveling Men's Association, an Iowa Corporation, on June 9, 1922, in the Circuit Court of Jackson County, Missouri, at Kansas City, this being within the Western Federal Judicial District. This cause was transferred to the Federal District Court for the Western District of Missouri on November 15th, 1922. The defendant appearing specially in said court, filed a motion to quash the service of summons made upon it as made in the State court

and dismiss said cause, reciting in said motion that it appeared specially for that purpose; on October 22, 1923, the court sustained the motion to quash the service of summons, but overruled the motion to dismiss.

June 17th, 1924, the defendant again filed a motion in said Federal court to dismiss the case on the ground that plaintiff had taken no further steps or action in the case since the further motion was sustained quashing the service and in said motion it again recited that defendant appeared specially for the purpose of said motion. This motion was overruled on November 24th, 1924.

On November 18, 1924, another summons was issued out of said Federal court and the same was served on one O. C. Sheley in Independence, Missouri, as being an agent of the defendant company, and on January 26, 1925, the defendant again filed its motion, reciting therein that it appeared specially and for no other purpose and asking that the service of summons therein be quashed and the cause dismissed for want of jurisdiction of the person of the defendant. This motion was argued and submitted to the said Missouri Federal court on the briefs and affidavits filed in support and in resistance of said motion and was on January 26, 1926, overruled, the court entering an order permitting the defendant thirty days to plead. The defendant failed or refused to appear at the end of the thirty days. Whereupon a default was requested by the plaintiff as against the defendant and the court proceeded to hear evidence and entered judgment in the sum of $8,240.00, with interest and costs, as against the said defendant.

A suit was then brought on this judgment in the District Court of the United States, Southern District of Iowa, Central Division, which was tried on a stipulation providing for a finding of facts by the court, and from the written opinion and finding of facts filed by the trial court we excerpt the following:

> "Upon the trial of the case in this court after plaintiff had introduced the judgment entry made and filed in the District Court of the United States for the Western District of Missouri, the defendant introduced uncontradicted evidence that said O. C. Sheley was not at the time the purported service of summons was had upon him, or at any other time, an agent or officer of the defendant company, and that the defendant company never transacted any business in the state of Missouri other than the issuance of policies of insurance to residents of said state. That said defendant company was never a citizen or resident of the state of Missouri, and does not now and never did have any office, agency or place of business or property of any kind in said state of Missouri.
>
> "The defendant also offered and produced evidence that O. C. Sheley is a physician and surgeon, who was on occasions employed by the defendant company to examine and report on the condition of policyholders who were making claims under insurance policies issued by the defendant company, but was in no way or manner an agent of such company.
>
> "Further evidence was offered by the defendant company that all contracts of insurance and policies issued by it were so issued upon appli-

cations for such insurance made to it at its home office in Des Moines, Iowa, and that neither in Missouri, nor in any other state, did it ever employ agents to solicit insurance other than its own policyholders should upon their own volition and without pay solicit applications, which, if approved by the home office, were issued by it at Des Moines, Iowa.

"The plaintiff offered no evidence in this court to contradict this evidence introduced by the defendant company, and the same stands undisputed and undenied. The Court, therefore, must find under the evidence in this court that the defendant company was at no time a resident or citizen of the State of Missouri; never transacted any business therein, and never did business within the state or maintained an agency therein that would subject it to the jurisdiction of a federal court of Missouri.

"The Court further finds that O. C. Sheley, upon whom a summons was attempted to be served, was not at that time, nor has he since been an agent or officer of the defendant company. And it follows that the attempted service of the summons upon a policyholder and occasional employe of the defendant was without force and effect, and did not subject the company to the jurisdiction of the federal court of Missouri.

"The plaintiff does not claim in this Court that the appearance of the defendant in the state court for the purpose of moving its transfer to the Federal Court was an appearance or conferred jurisdiction of the Federal Court upon the defendant, and it has been held that such appearance for this purpose does not confer jurisdiction.

"On October 22, 1923, the United States District Court quashed the summons, so that from and after that time the case stood in the United States District Court for the Western District of Missouri as though no summons has been issued.

"Neither does the plaintiff in this Court claim that the defendant by appearing specially by the motion to quash the summons thereafter issued and to dismiss the case for lack of the jurisdiction conferred jurisdiction on the Federal Court. That such special appearance did not confer jurisdiction on such Federal Court has been decided by several cases.

* * * * * * * *

"The plaintiff in this case bases its claim to the validity of the judgment in the said Court solely upon the claim that as the District Court of Missouri found adversely to the defendant on its motion to quash the summons served on O. C. Sheley, that this became *res* (*ad-judicata*) on the question of the jurisdiction of the United States District Court for the Western District of Missouri to render the judgment sued on in this case, and that by reason of said judgment the defendant is estopped of record to challenge the validity of said service of notice on O. C. Sheley, and the Court's finding in its memorandum of decision in ruling on said motion to quash that the defendant was in fact a resident of the State of Missouri at the time summons was so served on it in that state.

"Plaintiff's contention, or at least one of them, being that the defendant having appeared specially to quash such summons, and having

filed affidavits in support thereof, that in as much as the Court had found adversely on such motion the defendant was bound thereby. In other words, it is the claim of the plaintiff, as I understand it, that while the defendant may appear specially in that Court for the purpose of filing and having a hearing on a motion to quash and dismiss, and is not bound thereby because of such special appearance, yet, if the Court rules against it that this becomes a decision *res (judicata)* which cannot be collaterally attacked.

* * * * * * *

"The defendant, therefore, had a right in this Court to attack the jurisdiction of the United States Court for Missouri which rendered the judgment sued upon as having been entered. And the evidence in this case being undisputed that the defendant at no time was a resident of the State of Missouri, and the evidence clearly so showing in this case, it must follow that the Missouri Court was without jurisdiction to enter the judgment and that the same was null and void.

"The plaintiff places considerable reliance upon the fact that the judgment entry in the Missouri Court is entitled to great weight as it expressly finds that the Court has jurisdiction and contains about five type-written pages of findings and conclusions. It is true that a very strong presumption exists as to the validity of any action taken by a United States District Court, and every presumption prevails as to its validity. But, after all, questions of jurisdiction are mere presumptions and are always sub-

ject to collateral attack where the evidence clearly and conclusively shows that the Court was without jurisdiction."

The judgment of the lower court was for the defendant. The case was taken to the Circuit Court of Appeals and that court rendered its opinion affirming the lower court, which is set out at page 51 of appellant's transcript of record filed herein.

Points and Authorities.

1. The business of the defendant, as shown by the record, was such that, without being found in a foreign State, it could not be held to answer. It having no office, only in its home office, in the city of Des Moines, Iowa, employing and having no agents, in Missouri or elsewhere, and transacting its business only by mail, all its contracts being made at its home office. Hence, falling in that line of cases covered by:

Minn. Commercial Men's Assn. *vs.* Bem, 261 U. S. 140;

Higgin *vs.* Iowa State Traveling Men's Assn., 183 Fed. 845;

Tomlinson *vs.* Iowa State Traveling Men's Assn., 251 Fed. 171;

Shwayder *vs.* Ill. State Traveling Men's Assn., 255 Fed. 797;

Crew *vs.* Ill. Commercial Men's Assn., 256 Fed. 248;

Stier *vs.* Iowa State Traveling Men's Assn., 199 Ia., 118.

2. When a motion to quash service on removal from a State court is sustained in the Federal court, process may be issued, and service perfected only in the same manner, as in cases which are originally filed in such court.

Chap. 28, Sec. 83, U. S. Code.

3. The defendant, being a foreign corporation, not being a resident of a Federal district, not being engaged in business therein, and having no agent therein, no process can be served on it in such district on a case depending on diversity of citizenship.

Chap. 28, Sec. 112, U. S. Code.
Goldey *vs.* Morning News Co., 156 U. S. 518;
Chinn *vs.* Foster, 202 F. 175;
Walton, etc., *vs.* Com. Ind. Co., 282 Fed. 21;
Minton *vs.* Wells Co., 261 U. S. 267.

4. A special appearance to quash service, or to object to jurisdiction of the court, is not such an appearance as on overruling the objections to jurisdiction will warrant judgment against the defendant if, in fact, the objections to jurisdiction are good.

Big Vein Coal Co. *vs.* Read, 229 U. S. 31; 57 Law Ed. 1053;
Hitchman Coal & Coke Co. *vs.* Mitchell, 245 U. S. 229; 62 Law Ed. 260;
Toledo Railway & Light Co. *vs.* Hill *et al.*, 244 U. S. 49; 61 Law Edition 982;
York *vs.* Texas, 137 U. S. 15; 34 Law Ed. 604;
Davis *vs.* Cleveland, C., C. & St. L. R. R., 217 U. S. 157; 54 Law Ed. 708;

Bank of Jasper *vs.* First National Bank, 258 U. S. 112; 66 L. Ed. 490;

Morris *vs.* Skandinavian Ins. Co., 279 U. S. 405; 73 Law Ed. 762.

5. Jurisdiction of a court rendering a judgment may always be questioned in a subsequent action on that judgment in another State.

Thompson *vs.* Whitman, 85 U. S. 457; 21 Law Ed. 897;

Pennoyer *vs.* Neff, 95 U. S. 714;

Goldey *vs.* Morning News Co., 156 U. S. 518; 39 Law Ed. 517.

6. Presumption that a court rendering judgment has jurisdiction does not apply to a foreign corporation.

St. Clair *vs.* Cox, 106 U. S. 350; 27 Law Edition 222.

7. Jurisdiction of a court rendering judgment may be questioned on a subsequent suit on that judgment notwithstanding objection was made in the first court to its jurisdiction, and it then specifically held that it had jurisdiction.

Bank of Jasper *vs.* First National Bank, 258 U. S. 112; 66 Law Ed. 491.

When the case in Missouri was transferred from the State court in Jackson County, Missouri, to the Federal court, the motion to quash the service being sustained, the plaintiff therein then stood in the same

position as if the case had been originally commenced in the Federal court in the Western District of Missouri and, as we conceive it, was governed by Section 83, Title 28, of the U. S. Code, Annotated, which is as follows:

> "In all cases removed from any State court to any United States court for trial in which any one or more of the defendants has not been served with process or in which the same has not been perfected prior to such removal, or in which the process served upon the defendant or defendants, or any of them, proves to be defective, such process may be completed by the United States court through its officers, or new process as to defendants upon whom process has not been completed may be issued out of such United States court, or service may be perfected in such court in the same manner as in cases which are originally filed in such United States court. Nothing in this section shall be construed to deprive any defendant upon whom process is so served after removal, of his right to move to remand the cause to the State court, the same as if process had been served upon him prior to such removal."

Here by the ruling of the Federal court by reason of a defective process of the State served not on the defendant but one claimed to be an agent of the defendant, though in fact not. Hence, this was no service. The court then ordered new process or so-called *alias* summons. The provision as to service or service may be perfected in such court in the same manner as in cases which are originally filed in such U. S. court.

The new service that jurisdiction is claimed to have been acquired by, was the service on Sheley who was not an agent of the defendant. The defendant being a foreign corporation, doing no business in the State of Missouri, carrying on its business entirely in Iowa, as a mutual insurance organization, was not subject to service therein except in the same manner as if the case had been originally filed in that court. Original process may be served as provided in Section 112, Title 28, of the U. S. Code and in subdivision A thereof, providing as follows:

> "(*a*) Except as provided in sections 113 to 117 of this title, no person shall be arrested in one district for trial in another in any civil action before a district court; and, except as provided in sections 113 to 118 of this title, no civil suit shall be brought in any district court against any person by any original process or proceeding in any other district than that whereof he is an inhabitant; but where the jurisdiction is founded only on the fact that the action is between citizens of different States, suit shall be brought only in the district of the residence of either the plaintiff or the defendant."

There is nothing in Sections 113 to 117 of Title 28 of the Code which in any way would authorize the service upon this defendant, being as it was a corporation of the State of Iowa, not doing business in Missouri except by service of process in its own district in a suit commenced therein where the jurisdiction of the court depends upon diversity of citizenship.

So, then, it is our contention in this case that upon sustaining of the motion to quash service originally for

the Missouri court to get jurisdiction of the defendant, it was necessary that the defendant be found within that Missouri district, *i. e.*, that it be engaged in business therein and that it have an agent therein upon whom service could be made.

True, the U. S. District Court of the Western District of Missouri or the U. S. District Court of the Southern District of Iowa would have jurisdiction. In other words, the plaintiff could commence the case in either district so far as filing the same was concerned. She had the right to select in which district she would try it, but the defendant had also the right to require his service be made on it within its own district as required by law, and that could not be done legally by serving it in Iowa and neither could it be done by serving it on the agent of the company and it not doing business in the State of Missouri.

The motion filed on June 17, 1924, conferred no jurisdiction for the reason that there was a special appearance for that purpose and for that purpose only, and for the further reason that this motion was only in furtherance of the thought embodied in the original motion to quash the service.

2.

To this service of the alias summons on Sheley, the defendant filed its motion, appearing specially for that purpose and no other purpose, asking that the same be quashed for the want of jurisdiction of the person of the defendant. The personal jurisdiction depended, of course, upon the proper service of sum-

mons and, as we have seen, it was not served properly. The motion was argued and submitted to the Missouri Federal Court on the briefs and affidavits filed in support thereof but it was overruled. The defendant declining to go further, default was taken against it and judgment rendered which judgment is the judgment in suit.

The trial court found that the defendant company was at no time a resident or citizen of the State of Missouri, never transacted any business therein, and never did business within the State of Missouri or maintained an agency therein that would subject it to the jurisdiction of the Federal Court of Missouri, and further the trial court found that O. C. Sheley, upon whom the summons was attempted to be served, was not at that time, nor has he ever since been, an agent or officer of the defendant company, and as a necessary corollary said and it follows that the attempted service of the summons upon a policyholder, an occasional employee of the defendant, was without force and effect and did not subject the company to the jurisdiction of the Federal Court of Missouri.

Now the lower court further found that the plaintiff based her claim to the validity of the judgment solely upon the claim that as the District Court of Missouri found adversely to the defendant, on its motion to quash the summons served on O. C. Sheley, that this became *res adjudicata* on the question of the jurisdiction of the U. S. Court for the Western District of Missouri to render the judgment sued on in this case.

In other words, inasmuch as the court had found

adversely on said motion, the defendant was bound thereby although it appeared specially only for the purpose of raising the question of jurisdiction, and therefore the lower court concluded that the defendant had a right to attack the jurisdiction of the U. S. Court from Missouri which rendered this judgment sued on, the evidence being undisputed that the defendant was at no time a resident of the State of Missouri, and the evidence clearly so showing, it must follow that the Missouri court was without jurisdiction to enter the judgment and that the same was null and void.

We quote these excerpts from the opinion of the trial court for the reason that they go to what we conceive to be the ultimate and controlling principle which must decide this case in this Court.

3.

The defendant in this case is, as made in the statement of facts, an insurance organization, made up of traveling men. It has no agents. Applications are made to it at its home office at Des Moines, Iowa, by mail. They are there approved and a contract entered into and mailed. Assessments are made by mailing money received to keep the contract in force and losses are paid on proofs sent in by mail and checks sent out from the home office.

It is one of that class of corporations that is governed by the decision of this Court in Minnesota Business Men's Association *vs.* Bem, 261 U. S. 140, holding that it is not engaged in business in another State

merely because it writes under these circumstances people residents of other States, and the other cases are cited in Points and Authorities, Part One, one of them, from the Circuit Court of Appeals of the Eighth Circuit, dealing expressly with this defendant. So that there can be no question that this defendant was not amenable to the process of the Courts of the Western Federal District of Missouri, unless the proper conditions existed as to service in that district, which they did not.

Hence, the defendant was in a Kansas City court on a service that did not give jurisdiction of it. They appeared raising the question by a motion to quash the service, appearing specially for that purpose and no other purpose.

The effect of the court overruling this service and then proceeding to get judgment against the defendant was to force this defendant into court on an improper service in a case in which the defendant had not been properly servieed in that district and in a case in which the defendant was a resident of another district.

4.

By special appearance to quash service or to object to jurisdiction of the court is not such an appearance as on overruling on objections to the jurisdiction would warrant judgment against the defendant if in fact the objections to jurisdiction are good.

The finding of the lower court in this case is that the defendant company was at no time a resident or citizen of the State of Missouri, never transacted any busi-

ness therein, never did business within the State, never maintained an agency that would subject it to the jurisdiction of the Federal Court in Missouri, and that the party upon whom the summons was served was not an agent of the company upon whom the summons could be served, he only being specially employed at times to render particular services in examination of persons making claims and making reports to the defendant.

We recognize that this is the question in this case. On this we desire to call the Court's attention to what it said in Big Vein Coal Company *vs.* Read, 229 U. S., p. 31. It said:

> "It is a settled practice in the Federal Courts that an appearance may be made for the sole purpose of raising jurisdictional questions without thereby submitting to the jurisdiction of the court over the action", citing a number of cases in support thereof.

Again, this Court, in Hitchman Coal & C. Co. *vs.* Mitchell, 245 U. S. 229, said in its opinion:

> "The final decree of the district court included an award of injunction against John Mitchell, W. B. Wilson, and Thompson Hughes, who, while named as defendants in the bill, were not served with process and entered no appearance except to object to the jurisdiction of the court over them. Under the federal practice, the appearance to object did not bind these parties to submit to the jurisdiction on the overruling of the objection."

Again, in Harkness *vs.* Hyde, cited by the court as authority on the above proposition, from 98 U. S. 476, the court said:

> "The right of the defendant to insist upon the objection to the illegality of the service was not waived by the special appearance of counsel for him to move the dismissal of the action on that ground or what we consider as intended, that the service be set aside; nor, when that motion was overruled, by their answering for him to the merits of the action. Illegality in a proceeding by which jurisdiction is to be obtained is in no case waived by the appearance of the defendant for the purpose of calling the attention of the court to such irregularity; nor is the objection waived when, being urged, it is overruled and the defendant is thereby compelled to answer. He is not considered as abandoning his objection because he does not submit to further proceedings without contestation. It is only where he pleads to the merits in the first instance, without insisting upon the illegality, that the objection is deemed to be waived."

The Bank of Jasper *vs.* First National Bank, 258 U. S. 112, the court held that even under the statute of Florida, where on an interlocutory order the defendant appealed from a ruling overruling his objection to jurisdiction, it was not a general appearance and did not confer jurisdiction of the court to try the case.

Now, these statements of the court either mean something or they do not. If by appearing to object to jurisdiction where there is an improper service and no jurisdiction exists in fact, amounts to a general ap-

pearance in the case such as to bind the defendant, then, of course, his only remedy is by appeal, but if it does not, his remedy, after having raised this question, is to withdraw. He has done his duty. He is calling attention to the court that it has no jurisdiction. If it has no jurisdiction it has no right to hold the defendant, hence its finding cannot be held to be *res adjudicata*. In such cases as this the court gets jurisdiction of the person of the defendant by proper notice, *i. e.*, proper process, properly served on the defendant, or the defendant may personally, without any process at all, appear and plead to the merits. Courts do not get jurisdiction of the person of the defendant by dragging him in by any kind of a rope or by force, and then, if he opens his mouth to object, hold him to have appeared. A special appearance, such as is involved here, is notice to the plaintiff and the court that the defendant does not "submit" his person to the jurisdiction of the court to try the case. He is merely pointing out to the plaintiff and the court the fact that he is not legally in court, and will not submit to their trying the merits of the case and will not be bound by any judgment that may be entered against him upon the merits. This we consider to be the point in this case.

As jurisdiction may be always inquired into, this phrase is meaningless unless the defendant had the right on the trial of the case at bar in the lower court to show the facts which negative the jurisdiction of the Kansas City court. These facts were undisputed and the lower court so finds as set out in its opinion. There-

fore, unless the doctrine of *res adjudicata* is to be applied in this case, where the party wrongfully brought into court did not submit himself to the jurisdiction, the certiorari must be denied.

A decision is cited from the courts in Missouri, decided after this case was decided, the case of Hall *vs.* Wilder, 293 S. W. 760; 52 A. L. R. 723. This case was decided after trial of the original case in Kansas City. No rule in Missouri gave prior to that time the effect of the decision that is now claimed in this case. Even if it did, it would have no bearing on the Federal Court case decided under the circumstances of this case, *i. e.*, bringing the defendant into a wrong district upon an improper service. Now it may be urged that the rule we contend for here is unjust to the plaintiff. The plaintiff and her able battery of attorneys knew very well that the defendant could be sued in the State of Iowa, either in the State court or in the Federal District Court of the Southern District, Central Division, sitting at Des Moines. That there the case could be tried upon the merits of the original facts involved, but following the Missouri practice, because of the peculiarities in that statute which allow a claim on a $5,000 policy to grow into almost $9,000, they saw fit to step into the Missouri court, knowing that there was no jurisdiction existing there. They were notified of this in ample time by a filing of a motion to quash the service in the original case, and after the sustaining of that by the Federal courts they still persisted. If they are in any difficulties now, the difficulties are their own making. We think the Fed-

eral Court for the Western District of Missouri had no jurisdiction under the record to enter the judgment sued on in this case and that the writ of certiorari should be denied.

Respectfully submitted,

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EARL C. MILLS,
Of Counsel.